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Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 533.

KANSAS CITY LIVE STOCK EXCHANGE, SUB NOM. HENRY HOPKINS ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, APPELLEE.

REPLY BRIEF BY APPELLANTS.

L. C. KRAUTHOFF,
Of Counsel for Appellants.

KANSAS CITY, MO., *February* 15, 1898.

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The briefs which have already been filed are so voluminous that ordinarily a reply would hardly be justified. The assurance of the private counsel for Greer, Mills & Company, who are the authors of the presentation on behalf of the Government, that that brief was intended to be free from feeling or other fault was undoubtedly penned in good faith. Unfortunately, their zeal for the private interest which promotes and dominates this litigation made it impossible for them to live up to the standard set. It has been so often enjoined, and with particular emphasis by this court, that the course here pursued should not be tolerated. The evil of permitting the conception which Lord Brougham had of

his duty as counsel for a party charged with crime to control counsel for the prosecution is a serious one. It generally results in suppressing a fair presentation of the case and in putting the accused in danger that the court may attach a weight to facts stated by the nominal mouthpiece of the Government which it would not do if his real clientage were known, and when the regular law officer would, as he should, shrink from becoming a partisan of mere private interests and grievances.

As the usual result is present in this case also, it becomes our duty to correct such of the errors as can be noticed in the limited time at hand. If exchanges are to fall and their members to be stamped as criminals, it should be done fairly and with a solemnity befitting what will prove to be the most momentous and disastrous event in the commercial history of the United States!

THE STATEMENT.

1. The fact that the managers of packing-houses are members of the exchange is much dilated on, and some suspicion is sought to be aroused by reason of this alleged "union of sellers and buyers" in the same association. The uncontradicted explanation is detailed in the answer (Rec., p. 165) as follows:

"Most of said members are engaged in selling and sometimes in purchasing live stock for a commission and acting for others. There are also a number of members who are engaged in managing and operating packing-houses and other enterprises and deeply concerned in building up and maintaining the high standing of Kansas City as a point to which live stock may be shipped for sale or at which live stock may be bought under rules and regulations insuring honesty and fidelity and under uniform and reasonable rules and at uniform and reasonable rates of commission, and that such facilities shall be maintained for conducting the sale and purchase of live stock that persons desiring to sell or buy

the same will find it to their interest to do so. Accordingly, the persons last described and others interested are also members of such exchange, and each and every member thereof voluntarily either joined in originally establishing the same or has since become a member thereof, and that at no time has said exchange refused to admit as such member any reputable person who was willing to comply with the conditions of membership and to abide by the rules of said organization."

And again in the affidavits:

"The affiants say that the persons engaged in operating packing-houses at said Kansas City recognize, as do the persons engaged in commercial pursuits in all the large cities of the world, that the establishment and maintenance of an exchange is not only an absolute necessity to the transaction of business, but a decided advantage to the public. By means of the rules of said exchange honorable conduct is inculcated and required to be observed in all transactions, bad faith, extortion, and failure to keep business obligations are punished, and methods and facilities are provided by which the business is done expeditiously, fairly, honorably, and in the interests of all concerned. More violations of rules in respect of these matters have been made the occasion of discipline by the Kansas City Live Stock Exchange, and generally by commercial exchanges throughout the United States, than for other causes." (Rec., p. 179.)

2. It is also said that no one can buy or sell live stock at the yards in question without employing one of the defendants. The situation in respect to this phase of the matter, even if the circumstance can be deemed to be material, is fully explained on pages 166, 178, 179 of the Record.

3. That Greer, Mills & Company were members in good standing on November 16, 1896, is contradicted by the date given at the head of the reported opinion in Greer *vs.* Stoller, 77 Fed. Rep., 1, namely, November 6, 1896, by the fact that the mere restraining order in that case, granted improvidently and without jurisdiction, did not annul the suspen-

sion which had been previously pronounced, and by the express reservation of their status as suspended members which is contained in the resolution in reference to their withdrawal from membership. (Rec., p. 186.)

4. The attitude of the defendants in respect of Greer, Mills & Company is accurately defined in an affidavit (the matter being presented in that form because *the silence of the bill* on the subject made it improper to refer to it *by way of answer*):

"The only point of controversy is whether said Greer, Mills & Company, as suspended members of said exchange, are entitled to compel members of said exchange to deal with them in reference to live stock which the said Greer, Mills & Company are offering for sale as commission merchants and as competitors to the members of said exchange who are engaged in the same occupation, or to compel those members of said live stock exchange who, although not engaged in the commission business, are interested in the maintenance of the benefits and advantages of the exchange to purchase live stock from the said Greer, Mills & Company, which they offer as commission merchants. If the said Greer, Mills & Company desire to act as commission merchants in violation of the rules of said exchange and in competition of the members of said body, there is nothing to prevent non-members from dealing with them if they so desire, nor to prevent any member of said exchange from dealing with them if such member prefers to sever his membership in said exchange." (Rec., p. 178.)

5. The statement is repeatedly made (and the whole argument on an important part of the case is bottomed on the assertion) that "the commissions (now being) charged are substantially double those charged prior to the organization of the exchange." A series of apparent quotations from the rebuttal affidavits are relied on as proof. It is to be noticed that the sentences most strenuously urged consist of conclusions in the way of expressions of *belief* and *opinion*.

These further facts are omitted: Mr. Wilson, who acted as manager of several great cattle companies, said: "During these years (1881–'6) the *ordinary commission* charged was fifty cents a head for cattle," a deduction, when made, being in the way of "rebates," principally granted by solicitors (Rec., p. 229). Messrs. Goode, Boggs, and Whiting, whose affidavits are stereotype duplicates, concur in saying that this favoritism "depended a great deal upon *the volume of business*" done by the shipper (Rec., pp. 250, 251, 252); and Mr. Greer explained that while the *regular rates* were stated on the accounts rendered, yet a *secret account* of the rebates was kept separately and remitted for monthly. (Rec., pp. 236, 237.)

The affidavits of the very reputable and experienced gentlemen filed by the defendants (Rec., p. 182) show not only that the practice was far from universal, and that, so far as it was indulged in, it was with so much surreptition that they did not know of it, but that in point of fact the operations of the exchange had, on the whole, resulted in a substantial *reduction* of the commission charges, and that, too, for better service and increased facilities.

6. The confessedly irrelevant account given of the proceedings which resulted in the conviction of Greer, Mills & Company would not have appeared if this had not been a private action, but in charge of the law office of the public. The record shows that firm to have been properly convicted. No issue was made as to this, even in Greer *vs.* Payne, 46 Pac. Rep., 190, and Greer *vs.* Stoller, 77 Fed. Rep., 1. That the explanation volunteered in this court is a favorite one of these parties can readily be gathered from the proceeding before Judge Tuley, referred to on pages 214 *x*, *y* of our principal brief.

7. It is also said that it appeared before the circuit court that the rebuttal affidavits had been submitted to one of the

counsel for the defendants, etc. The word "constructively" ought to have been inserted; they were left at his office during his absence and called for before his return. It is conceded that the discretion exercised by the circuit court in this respect cannot be assigned as error; but the appellants are entitled to the benefit of the actual facts, to the end that they may not be charged with having failed to make a further showing, even if it had been permitted by way of surrebuttal, so to speak. The practice here pursued points the danger of passing on such matters on *ex parte* affidavits, and demonstrates the justice of the contention that the grant of such an injunction order—which operates as a final decree, annihilates the *status quo*, and is mandatory in form—is improvident and erroneous.

THE BRIEF.

A careful comparison of the positions urged by the parties respectively will serve to bring the points of controversy in bold relief.

1. That the rule on the subject of prepaid telegrams is *conceded* to be unlawful is a wholly unwarrantable assumption. The principal evil which gave rise to the rule is this: Some of the commission merchants inaugurated the practice of wiring indiscriminately to shippers on days when the market was favorable, urging an immediate consignment. As it could not be known how many would comply, practically all persons having cattle on hand would be wired to. When a deluge of these telegrams was thus sent out, a shipper often receiving a large number on the same day, the inevitable result was many times a glutted market and a corresponding break in prices. The effect on the standing of the market was disastrous, confidence was lost, and shippers who had thus been lured to a loss visited the blame on the exchange which tolerated such a course of conduct, on

the innocent as well as on the guilty. The consequence was the regulation in question, which has proved entirely satisfactory to all reasonable-minded shippers. Telegrams might be sent, whether requested or not, reporting actual sales on behalf of the addressee and to purchasers *ad libitum*, and if a given shipper desired further information he could wire for it or arrange in advance to have it sent to him.

The suggestion that the embodiment of this very reasonable arrangement was a restraint on interstate commerce because a telegraph company is engaged therein is novel. It proceeds, as does substantially all of the brief on the subjects of interstate commerce and the proper construction of the act of July 2, 1890, and of the opinion of this court in the trans-Missouri case, on the assumption that every arrangement which *operates on commerce* among the States in any way whatever is a violation of the statute.

The errors which pervade the presentation are these:

a. States can *neither regulate nor restrain* interstate trade or commerce. Private contracts may *regulate* it in an infinite variety of ways, but must not unlawfully restrain it.

b. A regulation for the orderly conduct of trade is a benefit thereto and does not constitute a *restraint* thereof in any sense whatever.

c. The act of July 2, 1890, does not mean that hereafter any and every private contract affecting or operating upon interstate commerce or the manner of conducting it is for that reason criminal.

d. Association is not of itself unlawful. Each case must depend upon its own peculiar facts and involves the inquiry of a restraint imposed—*i. e.*, injury done or necessarily resulting to the public.

2. The various subdivisions of the rule concerning solicitors are manifestly intended to prevent evasions, and if there is a right to make the rule, self-evidently, evasions thereof may be guarded against. That the rule was dictated by the experience of so many persons, each vitally interested in maintaining the market (but antagonists in other respects), and the universality of concurrence in the propriety thereof make it impossible to conceive that the public is injured as a result. Unconsciously, no doubt, but very properly, counsel repeatedly concede that this and other rules are merely *regulative*.

The importance sought to be attached to what was said in the recent case of People vs. Chicago Live Stock Exchange, 48 N. E. Rep., 1062, warrants these suggestions:

a. A review of the rules of that body manifestly convinced the State's attorney and the very learned counsel who were associated with him that the *only one* which was open to even inquiry was that concerning solicitors.

b. In other respects the people of the State of Illinois in substance admitted of record that the organization and its rules were not only free from illegality, but that their maintenance and enforcement were beneficial to the public interests.

c. The court declared that the purpose of the exchange "is undoubtedly, if carried out to the fullest extent, in the interest of the public," and yet, as will be hereafter shown (*k*), the decision announced, if logically applied, would prove to be a most formidable obstacle to the consummation thus indicated.

In dealing with matters of public concern it should be constantly borne in mind that "government is *a practical thing*, and it is always well to see that in *preventing one evil*

a greater evil than that sought to be guarded against *has not been created.*

People *vs.* Board of Canvassers, 82 N. Y. State Rep., 866; 48 N. Y. Supp., 866, 868.

d. The provision before that court was *a by-law of a corporation,* which apparently had been adopted by the majority of the members over the protest of what the information described as "a large minority," and the point in judgment was that it was beyond the power of *the corporate body* to enact the same. The Kansas City Exchange is *a voluntary association,* and its rules evidence *the unanimous contractual obligations of its members.*

There is a broad distinction between a by-law of a *corporation* and a rule or other provision embodied in the contract between the members of a *voluntary association.* The former are subject to the test of *reasonableness,* while the latter are valid, *however unreasonable they may be.* Corporations make by-laws by virtue of a granted power, while individuals in agreeing to such rules exercise an inherent right to contract. The right to suspend from membership in a corporation involves and depends upon entirely different considerations from those which fix the result of a failure to observe contractual rules. Such non-observance is a *breach of contract,* and operates, *ipso facto,* as a withdrawal from and a surrender of a membership granted by contract in the first instance, and the continued existence of which is conditional upon an unbroken compliance with the member's obligations under that contract.

1 Thomps., Corp., § 845, and note, p. 676.
1 Beach, Private Corp., §§ 319, 83, 84, 309.
Boone, Corp., § 335.
Bacon, Benefit Societies, § 89.
Niblack, Benefit Societies, 2 ed., § 73.
Austin *vs.* Searing, 69 Am. Dec., note, 672–677.

Hiss *vs.* Bartlett, 63 Am. Dec., 776.
Otto *vs.* Tailors' Union, 7 Am. St. Rep., note, 163.
Hyde *vs.* Woods, 2 Sawy., 655, 659; S. C., 94 U. S., 523, 525, 526.
Lewis *vs.* Wilson, 121 N. Y., 284.
Comm. *vs.* Union League, 135 Pa. St., 301, 327.
Supreme Lodge *vs.* Kalinsky, 57 Fed. Rep., 348, 351.
Supreme Lodge *vs.* Wilson, 66 Fed. Rep., 785.
Greer *vs.* Stoller, 77 Fed. Rep., 1, 8.
Borgraefe *vs.* Knights of Honor, 22 Mo. App., 127, 142.
Hammerstein *vs.* Parsons, 38 Mo. App., 332, 336.
Warren *vs.* Merchants' Exchange, 52 Mo. App., 157, 167.

Many matters may very well be the subject of a valid contract which would not be good as a by-law.

Adley *vs.* Whitestable, 17 Ves., 315, 323.
Dawkins *vs.* Antrobus, L. R., 17 Ch. Div., 615, 628-31, 634.
Elsas *vs.* Alford, 1 City Ct. Rep. (N. Y.), 123.

e. The greater part of the opinion under review consists of mere *dicta*. The declaration that liberty of *contract is a constitutional right* is manifestly correct, but, as applied to the case here at bar, it would prove not that parties are *licensed to break contracts* into which they have entered at pleasure, and to nevertheless enjoy *all the benefits thereof*, but that any attempt to enforce a breach of contract or to abridge the right of contract, whether by legislation or judicial declaration, would be violative of the very constitutional guaranties referred to.

f. The theory of a *constructive* injury to the public has never been properly applied to a mere private occupation, and finds no recognition in the act of Congress under consideration, as shown in our principal brief (pp. 211 *et seq.*).

g. The better considered cases and the manifestly correct principle of the thing are wholly at variance with the *dicta* announced.

More *vs.* Bennett, 140 Ill., 69, has been repeatedly and clearly shown to be erroneous (see cases in Principal Brief, pp. 240, 249), and proceeds upon a grievous failure to recognize the distinction declared in Morris Run Coal Co. *vs.* Barclay Coal Co., 68 Pa. St., at 188, and enforced in many well-considered cases. Curiously enough, the Pennsylvania case is relied on in the recent deliverance, and the distinction therein declared again overlooked.

h. The English cases of the Ipswich Tailors, 11 Coke, 53, and Rex *vs.* Cooper's Company, 7 T. R., 543, each involved the validity of a by-law of a corporation which sought to prevent persons from exercising a trade who had complied with all the requirements of the statute on the subject and who were strangers to the association. (Cuddon *vs.* Eastwick, Salk., 193.)

When the Ipswich tailors' case was cited to Lord Mansfield he declared that "in that case the by-law was against law; *it was against the 5th of Eliz.*, and a farther restraint than the act had made," and proceeded: "but this by-law is not against any law; it is *not a restraint upon trade*, but seems a *reasonable regulation*."

Green *vs.* Durham, 1 Burr., 127, 131.

Shortly after the same great judge, when the Ipswich Tailors' case was referred to as authority for condemning a regulation of the qualifications of apprentices to surgeons (a matter not covered by Stat. 5 Eliz.), said that "*it was too plain to argue*" and upheld the provision.

Rex *vs.* Company of Surgeons, 2 Burr., 892, 897.

The Illinois court also cited Society of Gunmakers *vs.* Fell Willes, 384, in support of its conclusions, but wholly over-

looked that there the court was careful to draw the important distinction (noted on pp. 99–101 of the brief) between *regulations* for conducting trade and *restraints* of trade, saying that "*it is for the advantage and not to the detriment of trade that proper regulations should be made in it.*" (388, 389.)

So Lord Loughborough declared (1790) that "it is *an object of public policy* that the exercise of certain trades should be under the *regulation* of particular bodies."

Butchers' Company *vs.* Morey, 1 H. Bl., 370, 374.

i. People *vs.* Fischer, 14 Wend., 9., has long since been recognized as going too far (2 Whart. Crim. Law, 9 ed., § 1366, p. 215, note) and as being so plainly erroneous that it is strange that any doubt should ever have been entertained on the subject. (Principal Brief, pp. 240, 249.)

Houston *vs.* Reutlinger is in effect diametrically opposed to Mr. Justice McKenna's conclusions in Continental Insurance Co. *vs.* Board of Underwriters, 67 Fed. Rep., 310, and even the Kentucky court has very recently expressed "serious doubts," at least, whether its former deliverance can justly have application to the rules of an exchange.

Globe Tobacco Warehouse Co. *vs.* Leach, 43 S. W. Rep., 423, 424.

j. The reasons for the rule in question stated in the answer in that case (48 N. E. Rep., at 1064) amply demonstrate that trade and the public interests would be better served by such a regulative measure than by permitting or reinstating the evils sought to be remedied thereby. The orderly conduct of trade is the most essential condition to its prosperity.

k. The solicitor's rule rests upon this additional basis: As is the case in business generally, the occupation of live-stock commission merchants is carried on in some instances by corporations or partnerships which are possessed of large

capital, but the great majority of such merchants are men of limited means only. If it be true that the employment of solicitors operates to increase the volume of business done by the employer, it follows that if those whose financial advantages enable them to do so may employ an unlimited number of solicitors they will draw unto themselves *practically all* of the business. Thus the few wealthy concerns would have it in their power to soon crush out their humbler and less fortunate competitors. The latter will either be without the requisite capital to maintain the army of solicitors from which consignments are expected or in their efforts to do so they will incur an expenditure so large as to speedily and inevitably cause their insolvency and resulting retirement from business. Such a rule operates to make it possible for *many* to follow this occupation. The absence of it would enable *the few* to aggrandize themselves and to confine the occupation to their own hands. In truth, this and similar rules are *spurs to competition* and enable it to be maintained. As already indicated, "competition to be *effectual* must be *constant*, not fitful" (Brief, p. 214, *k*). It is not perceived how trade can be benefited or the public welfare promoted by *driving out* 80 per cent. of the persons engaged in a given occupation, thus leaving the comparatively small remainder to hold the field, and that, too, by force of the power conferred by their superior financial equipment.

In view of the fact that the reason usually given for rulings which are supposed to effectuate a result believed at the time to be diametrically the opposite of this is the duty of the courts to check "the grasping tendencies of wealth" and to protect the weak against "the overpowering force of the strong," it is strikingly extraordinary that the *same argument* should be advanced in support of a conclusion which arms the prescribed "class" with a weapon infinitely more potent than any they could possibly forge without the aid of affirmative judicial sanction.

In the trans-Missouri case this court declared that trade

or commerce may "be badly and unfortunately restrained *by driving out of business the small dealers and worthy men* whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings," and, in language deeply tinged with pathetic mournfulness, deplored a condition by which a favored few would be enabled to inflict a great misfortune upon the country "by depriving it of the services of a large number of small but independent dealers who were familiar with the business and who had spent their lives in it, and who supported themselves and their families from the small profits realized therein." It was emphasized that "it is not for the real prosperity of any country that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it might be, into a mere servant or agent, * * * having no voice in shaping the business policy (of his employer) and bound to obey orders issued by others." (166 U. S., at 323, 324.)

And if the recent Illinois case does not logically produce a state of affairs at the Chicago stock yards which will justify such a lamentation, it will not be because the decision does not invite and sanction it. The great commission firms at that market are thereby told that they may lawfully exercise their "motives of an individual or corporate aggrandizement" to an unlimited extent under the protection of constitutional guarantees, be the consequences to the "small but independent dealers" what they may, and although the ultimate effect upon the market in question may be to put it in the control of "the corroding hand of wealth." It is to their credit that they, in all probability, will not exercise the powers thus given them to crush out their many smaller competitors and to transform them into "mere servants or agents;" and it is equally sure that if they did undertake to formulate the *logic of the decision into actual practice* the supreme court of Illinois would speedily align its rulings to the great preponderance of authority

on the subject and declare that the great powers of government should be sternly exercised to the confusion of what it would *then* denounce as an "astute and avaricious combination of monopolists." An answer that, pursuant to the former judicial declaration, their erstwhile competitors were *now* employed as solicitors, salesmen, or clerks would be characterized as proof conclusive that public policy had been offended. A suggestion in support of the answer that the course pursued had been enjoined by the court itself, or that judicial consistency ought to be observed in the premises, would doubtless be treated as fraught with an implication of insult. An appeal to be relieved from the point of danger "between the devil and the deep sea," into which the court had placed the defendants, would in all probably fall on deaf ears.

The exchanges have been called upon to choose between these alternatives on this subject.

a. If solicitors are to accomplish the purpose of their employment, the firm enlisting the largest army of them will in consequence reap a proportionate percentage of the business. As the business of one increases, that of his competitor must necessarily decrease. As a result, in course of time a few will succeed in soliciting to themselves practically all of the business. Their competitors must either respond with a like army—thus increasing the necessary expenses of the occupation to such a point that a corresponding change in the rates of commission must be made to meet the deficit—or find themselves bankrupt as the result of an expense account in excess of income earned.

b. To regulate the number of solicitors so as to be fair to all, and thus to subserve the public interest and the reasonable necessities of the business. Those desiring to employ such agents may do so to the full extent that a fair regard for the maintenance of the market and the existence of their

smaller competitors as independent dealers will permit. Thereby the latter are neither overwhelmed by a force which their limited means do not enable them to successfully contend against, nor driven to financial ruin as the result of a despairing effort to uphold their individuality.

As in the case of many other complex problems to which modern commerce has given rise, the Kansas City Exchange has evolved a solution in the premises which is so manifestly just to all concerned that its rule on the subject has the unanimous support of its members. That fact of itself is proof conclusive that trade is not injuriously affected. (Brief, pp. 113, 114.)

"That it must be convenient is shown by the fact that it has been established and followed." (Moult *vs.* Halliday, L. R., 1898; 1 Q. B., 125, 130.)

In the absence of a showing of injury to the public, the right of the exchange to regulate and of its members to contract with each other in respect of the matter ought not, and cannot consistently with the recognition of constitutional guaranties, be interfered with.

Indeed, it has been and is being urged by many that it would be in the interest of trade to provide by law that *no solicitors whatever* should be employed, and the state of facts portrayed in 48 N. E. Rep., at 1064, is relied on to warrant the contention. Suppose that an exchange should by unanimous vote, evidenced by a contractual rule voluntarily assented to, adopt such a provision, would it be condemned? Is it not manifestly true, as said by Judge Wheeler of a somewhat similar rule, that "dispensing with soliciting agents or the control of them cannot be illegal, nor an agreement to do so be an illegal contract"?

U. S. *vs.* Joint Traffic Ass'n, 76 Fed. Rep., 895, 897.

An eminent judge of wide commercial experience has well said:

"An agreement to be no longer a party to such a system of unfair competition strikes us as being *eminently in the interest of good morals, fair and free trade, and honest rivalry in business.* If dry-goods houses in a certain town should agree to employ *no drummers* for trade, or hotel-keepers to employ *no runners*, the contract would be much of the same character, and we see nothing illegal about it."

Koehler *vs.* Feuerbacher, 2 Mo. App., 11, 15.

The question in all such cases is whether "this is an honest and upright contract" and one "by which the public are not injured."

Wickens *vs.* Evans, 3 Y. & J., 318, 330.

3. The charge that an arrangement to divide commissions with persons shipping cattle to Kansas City which had previously been consigned to a competing market is accorded extensive elaboration. This is so palpably different from State legislation intentionally discriminating against the products of other States that it needs no argument to demonstrate it. If the proprietor of an hotel or restaurant should direct that no dressed beef should be served to his guests unless first inspected by one of his employés, he certainly would not infringe upon the commercial power of Congress by excepting meats from local packing-houses from his rule. Indeed, he would not do so if he expressly refused to purchase meats coming from another State and for that precise reason.

4. In one paragraph it is said that "the amount of the commission is paid *by the owner of the cattle*, and the greater the commission the less are the net proceeds of his shipment." Later on the exigencies of the occasion impelled the same counsel to say that "the charge enters into and becomes a part of the price for which this food product is sold," namely, the buyer or consumer makes the payment.

The fact that the former is true proves no criminality, unless, indeed, it can be said that the charge of any commission whatever is equally wrongful. So long as a reasonable compensation for services actually rendered is the extent of the "restraint," there can be no wrong, for without such a service and compensation therefor there would and could be no trade.

If the consumer pays for the service it cannot be pretended that he would pay less because the former owner had received a rebate or been the beneficiary of a discrimination infinitely more reprehensible than a division of commissions with another person following the same occupation at a competitive market.

5. After asserting that "the defendant commission men are engaged in *promoting* this trade," and that the rules at bar operate as *regulations* for the conduct of the trade thus furthered (neither of which statements are open to denial), counsel claim that by this act "Congress has assumed jurisdiction of all matters *relating directly or indirectly* to interstate commerce."

The two statements first made demonstrate that there is no *restraint* of trade, and the latter is in the teeth of U. S. *vs.* E. C. Knight Co., 156 U. S., 1.

A sentence is quoted from *Ex parte* Debs to the effect that individuals may no more obstruct such commerce by their acts than a State by legislation. Doubtless a conspiracy to obstruct such commerce, the end or the means, or both, being unlawful, is an offense against Federal authority; but that does not prove that a mere regulation, the ends and means being both otherwise perfectly lawful, is a violation of the statute under consideration.

The entire argument is built upon these propositions:

a. That an association of persons engaged in a mere private service, including an exchange intended, among other

things, to establish uniformity, is in law subject to the same rule which condemns combinations to fix the price of commodities or articles of prime necessity.

b. That regulations for the orderly conduct of such an occupation are necessarily a restraint on trade.

In support of *a*, More *vs.* Bennett, 140 Ill., 69, and People *vs.* Fisher, 14 Wend., 1, are relied on, followed by extensive quotations from cases concerning combinations of the other class noted.

The distinction between the different classes referred to is emphasized and established by a multitude of cases which are noted in the appellants' principal brief (pp. 51–57, 239-245, 249).

As to *b*, counsel has quoted that the early common-law rule on the subject of contracts in restraint of trade has given way to a more liberal rule, the former having been made "under a condition of things or state of society far different from those which now prevail." By a startling process counsel has completely reversed the thought thus phrased. The same quotation is now urged as authority for the conclusion that Wannel's case and the many approving the rules there laid down have been overruled. These cases run back to the earliest days and, except in this case, have been accepted as indubitably correct. It is there established that a regulation for the orderly conduct of an occupation, framed and administered by those best fitted and most deeply interested in its welfare, is in no sense a restraint, reasonable or unreasonable, within any possible view of the question (Appellants' Brief, pp. 99–101, and *supra*, herein). The difference in conditions and in the state of society doubtless emphasizes the soundness of these authorities, but it certainly does not operate to overrule them.

6. Whether it be true that the purpose of exchanges is to stifle competition can be judged by what is said in the principal brief. Until very recently no such thought has ever entered the mind of even the most extreme critic of modern conditions. If it be true that their purpose is to establish uniformity in charges and usages, to suppress favoritism and improper practices, to build up and maintain a market and its good name, to inspire public confidence, and to regulate for the protection of the rights and interests of all, and so it is unanimously said by those who have given the matter a comprehending and discriminative consideration, their annihilation or to deprive them of some of their most potent powers for good would be a most appalling commercial calamity.

It is not an instance of welding many diverse interests into a partnership. An exchange is not engaged in business at all. It merely provides rules and machinery for the doing of business and regulates the manner in which its members shall do business or exercise an occupation to the ends above reiterated.

Even the case of Hoffman *vs.* McMullen, 83 Fed. Rep., 372, cited by the appellee, and which was decided largely on the authority of what was said in Hyer *vs.* Richmond Traction Company, 80 Fed. Rep., 839, and before this court had sanctioned the views of Judge Brawler in that case (18 Sup. Ct. Rep., 114), although otherwise without proper analogy, distinctly recognizes that "there may be a combination that *saves* as well as a competition that *kills*" (at 377).

No one claims that there is magic in the title "exchange." That the form of organization which prevails in a typical and real exchange for beneficent purposes is simulated and the name adopted by parties desirous to serve a legally reprehensible purpose, instead of placing them on the same basis under the law, serves to emphasize most strongly the high standing to which such a body as this is entitled. The

situation is not without precedent. The livery of the good or harmless has many times been assumed by the vicious and dangerous.

Hence it is that the New York cases concerning exchanges, many in number and uniform in tone and conclusion, constitute the strongest conceivable authority in our favor. The same differentiation observed by those courts between unlawful organizations and real commercial exchanges, if applied here, will make the solution of this appeal both easy and to the interests of the public.

7. The fact that the packers, so called, belong to this exchange has already been elucidated. Every exchange embodies a representation of both buyers and sellers. Unless it did so, there could be no trade. "It takes two to make a bargain." Indeed, it is said in one of the quotations made by the appellee, as being descriptive of an "ideal exchange," that "the market rises to its *highest efficiency and value* when it *concentrates* into one focus (the largest possible) portion of *the buyers and sellers.*"

Here there is no pretense that the packing-house managers are being coerced or otherwise interfered with. For reasons satisfactory to themselves, and which are palpably deserving of commendation, they have voluntarily become members of the exchange. They have no desire to withdraw. If there is a constitutional right to contract, as is insisted, why convict them of a crime for exercising that right and for observing a valid contract thus entered into under the protection of a constitutional guaranty? The sum and substance of the complaint in the present instance is that these gentlemen are keeping the contract they have thus made. "There are mutual advantages, and the duty to observe the rules is but the equivalent for the benefits derived" by them from the maintenance of the market and an efficient system of inspection, and the enforcement of the rules requiring a prompt performance of all contracts made,

and otherwise preventing wrong-doing and commercial anarchy.

Player *vs.* Vere, T. Raym., 324, 327.

Certainly the packers may buy from whom they please, with or without reason. This is the true meaning of the constitutional right to contract. They cannot, by means of a mandatory injunction or otherwise, be compelled to buy from those whose success, either in fact or as they honestly believe, will be to their ultimate injury, nor to break contracts they are desirous to observe. Instead of it being a crime on their part to exercise these acknowledged rights, it is an unpardonable infringement of their status as freemen to undertake to control them in the premises.

8. These considerations, constantly to be borne in mind, show the utter inapplicability of any of the highly refined rules undertaken to be applied on "social grounds" in some of the modern conspiracy cases. The present is merely an instance in which certain persons are exercising inalienable and undeniable rights, as a result of which another cannot complete as successfully as he desires. No well-considered case has ever held that a person is entitled to the privileges of membership without being a member; much less, that although he refuses to become a member, he is entitled to compel the affirmative aid of the members to the end that he may victoriously overcome the organization and its constituent members who are his competitors.

Even Vegelahn *vs.* Guntner, 167 Mass., 92, recognizes that—

"A combination among persons merely *to regulate their own conduct* is within allowable competition and is lawful, although others may be indirectly affected thereby."

The idea that because a person has made and is willing to keep a lawful contract he is thereby under a constraint

amounting to moral intimidation is a startling conception. It is a wrong to *break* such a contract, and by this newly evolved theory he is to be stamped as conclusively a criminal *for not committing that wrong.*

Nor can an observance of obligations, lawfully and voluntarily assumed, be deemed to evidence malice against another. This is recognized with more or less clearness in all the cases cited by adversary counsel; certainly so by Temperton *vs.* Russell and Flood *vs.* Jackson.

The case of Flood *vs.* Jackson has very recently been reversed by the House of Lords. The information given by the press is not sufficiently full to warrant a statement of the conclusions there reached, nor has a copy of the opinion been obtainable. It is foreshadowed that Temperton *vs.* Russell has been in effect overruled, and views expressed in line with those announced by Judge Holmes in Vegelahn *vs.* Guntner, 167 Mass., 92.

The theory that because competitors are not permitted supinely to succeed, the association, formed ten years before, is thereby transformed into a criminal conspiracy, logically means that competition is itself unlawful. Competition implies an effort to succeed to the disadvantage of trade rivals. The fruition of that effort on the part of one can only come when a less degree of success has attended his rival. To say that one must compete with might and main and use every possible available instrumentality and is guilty of a crime if he contracts not to do so, and that he is equally guilty (indeed, under the very same section of the statute) if his efforts result to the financial injury of a trade rival, is worse than a strange perversion and involves a monstrous inconsistency; it is *an absolutely impossible standard.*

Were it conceivable, it would be made even more so by the doctrine that an agreement among the members of a single partnership or between officers of a single corporation may form the basis of a conspiracy (People *vs.* Duke, 44

N. Y. Supp., 336). As applied to the present case, this can only mean that every trading firm in the land *must permit its competitors to succeed*, and even *help them to do so*, or stand conclusively guilty of a criminal offense.

Curran *vs.* Galen, 152 N. Y., 33, proceeds upon the ground that a combination without lawful excuse and intended to injure another, and directed against a non-member free from binding obligations voluntarily assumed, is actionable. The court was, however, careful to say that "in the general consideration of the subject it must be premised that the organization or the co-operation of workingmen is not against any public policy; indeed, it must be regarded as having the sanction of law when it is for *such legitimate purposes* as that of obtaining an advance in the rate of wages or compensation or of *maintaining such rates*."

9. The ultimate construction of the second section of the act of July 2, 1890, will doubtless be attended with great difficulty and involve exceedingly careful consideration. As this exchange is not engaged in business at all, it cannot be or become a monopoly. That its members in the aggregate—each, however, acting for himself—have succeeded or will succeed in being selected whenever a commission merchant is desired to be employed, or even in making it essential to a satisfactory sale that such employment shall be had, involves no element of a prohibited monopoly. If so, then every merchant who seeks to gather all the trade of a locality to himself is by that ambition (and certainly by his success therein) irretrievably guilty of a crime.

In the trans-Missouri case each defendant railroad company was a "virtual monopoly" (166 U. S., at 336); but no one supposed, even for an instant, that for that reason its officers and directors were guilty of an offense (People *vs.* Duke, 44 N. Y. Supp., 336). It was not even claimed that the combination of "virtual monopolists" into a freight association was a violation of section 2.

The stress of the case has driven counsel to contend that whenever a given business, such as those involved in Munn *vs.* Illinois and kindred cases, has reached a magnitude justifying a State regulation of rates—*i. e.*, if it has become a "virtual monopoly"—the further continuance of that business, if it operates on commerce among the States or "stands in the gateway" thereof, makes the proprietors amenable to section 2 of the Federal act.

Misconceptions of this nature and the loose use of terms are responsible for such grossly erroneous statements as are to be found in More *vs.* Bennett, 140 Ill., 69, and Greer *vs.* Payne, 4 Kans. App., 153. In both the vital distinction between trade and an occupation was wholly ignored. Each assumed that the organization itself was engaged in business. It is charitable to conclude that the term "monopoly" was intended to be used in a sense far different from that given it by the law.

Referring again to Greer *vs.* Payne, it is to be noted that:

a. The statute relied on is not the basis of this case.

b. That statute is, however, clearly unconstitutional, for reasons assigned on page 189 of the principal brief and reinforced by what is said and quoted on pages 214*b* and 214*c*.

c. The complaint in that case charged the elements of illegality, and the ground upon which the decision was based was that *upon their own showing* the plaintiffs could not be heard; hence what is said in addition was merely *obiter* and can apply only to the facts assumed; it does not prove *those facts to be true.*

d. The points of defense urged by counsel for the defendants in that case did not involve the legality of the organization or its rules, and no showing was made on the subject, as is done here.

e. The case strongly emphasizes the danger of passing on such cases on mere *ex parte* statements of angry litigants and without a careful attention to the precise actual facts.

Inspired, manifestly, by that case and blinded by zeal for a private clientage, the brief for the appellee contains a remarkable array of alleged statistics to prove that this case involves a saving of $5,000,000 to the cattle shippers of the West during the next decade.

The record reference (p. 78) shows the total number of cars of *all classes of live stock* received at this market. It does not show how many of the cars contained, respectively, cattle, hogs, sheep, horses, and mules. To the aggregate received during the past ten years (stated to be 1,000,000, but really 947,649) the average charge of $10 per car is applied by counsel. Looking at the numbers of the various classes which are stated on the same page, it is a most liberal estimate that out of the total only one-half the cars contained cattle. The defendants have no concern with the horses and mules, which must therefore be deducted. The remainder were hogs and sheep.

Assuming that there were as many as 500,000 cars of cattle, and that the horses and mules filled 27,000 cars, there were 420,000 cars of sheep and hogs. The commissions on these under the rules were, on cattle at $12 per car, $6,000,000, and on hogs and sheep at $6 per car, $2,520,000—a total of $8,520,000. The uncontradicted proof shows that from 50 to 70 per cent. of this amount was paid for *necessary expenses* incurred in earning the commissions (Rec., p. 182), which are computed at rates prevailing throughout the United States and are universally conceded to be reasonable (Rec., p. 180; Brief, p. 214*w*). Taking the average of the expenses to be 60 per cent., the net result is $3,408,000, or, on an average, $340,800 per annum.

If the average number of commission merchants during this period be taken to be 150 (they are now 200), the amount

realized to each per annum from this source was $2,272, which, considering the skill and capital invested, the amount of labor done, and the fidelity displayed, is so palpably a reasonable return as to leave no room for doubt on the subject.

It appears by the Record (p. 127) that the total value of the live stock thus sold during the decade under consideration was $760,400,000. There is not a single instance in all these vast transactions in which the exchange has failed in its purpose to protect the shippers and buyers and to prevent wrong-doing. The gross commissions charged were at the rate of *one and one-eighth per cent.* on the proceeds realized, and the net returns to the commission merchant were less than *one-half of one per cent.*

These conclusions are wholly incompatible with the existence of a "grasping monopoly." As rebates were formerly only granted to a few and the deficit resulting from a discharge of the occupation for less than the actual expense attendant upon its proper performance had necessarily to be made up in some other way, the benefits of uniformity are clearly demonstrated. When it is remembered that in the natural course of things many commission merchants fall below this average, the truth of the showing (Rep., p. 182) that "for the greater part, the members of the said exchange, although they have been engaged in their occupation for years, are possessed of limited means only" becomes incontestably true. The exclamatory comment on this subject should more properly have undertaken to show how, in view of the figures disclosed by the record, this exchange has succeeded in restraining trade.

10. The course pursued in reviewing the authorities referred to in our principal brief is as novel as some of the contentions urged *sub nomine* the government. Without reference to the page referred to or the point in illustration or support of which our reference is made, counsel present

a quotation from a different page or on another subject discussed in the opinion, and conclude with an expression of inability to appreciate the relevancy of our citations. This result is most confusing, and unfortunately will add greatly to the labors of the court.

So, too, the relevancy of the history of exchanges and of the many unstinted commendations showered on them in all ages and from all authorities, who were properly equipped by study and the possession of knowledge to express an opinion in the premises, is not apparent to counsel. In truth, the bearing is most potent, and the force of these conclusions has not been attempted to be broken, unless it be by the statement that no other exchange will be affected by the result. The answer (Rec., pp. 163, 164) distinctly alleges that this body is but a type of the many well-regulated exchanges existing throughout the civilized world. The showing that a decree as herein prayed for will, if affirmed, be the death-blow to all exchanges on American soil was and remains uncontradicted, and the disastrous result of its rulings was conceded by the circuit court (Rec., p. 269), but regarded as an immaterial consideration.

The review presented in our principal brief is intended to aid the court in understanding the purposes of exchanges and the scope of their several rules; to demonstrate the view taken of them by courts, statesmen, political economists, the commercial world, and the public generally. The very fact that courts have been so seldom called upon to consider the legality of the rules here attacked is of the utmost importance, in view of the countless instances in which a question on the subject would, if room there was for one, most naturally and with unmistakable certainty have been presented and strenuously urged. The rules of law and the authorities presented in support of the pending proceeding are not so obscure or completely hidden that they can be said to have been beyond the knowledge of counsel and courts concerned in deciding cases affecting exchanges in the past.

Under the circumstances, and considering the number of the persons and the vast amount affected, a negative line of authority is of the very greatest conceivable authority. That character is best which has never been challenged.

11. The London Stock Exchange has apparently been the source of an unusual amount of perturbation to counsel. In the circuit court it was said by the same counsel: "We entertain a high respect for the London Stock Exchange, in which gambling and wagering contracts *are prohibited*." Here the statement is: "in which gambling and wagering contracts *are not prohibited*." Again, it is said: "The London Stock Exchange is under the supervision of the government," which is an entire error. On the contrary, the royal commission, in recommending that it be incorporated, imposed the important qualification that the *element of self-government* should be *carefully preserved*. The matters shown on pages 107–112, 135–139, and 214*et seq.* of our Principal Brief disclose that counsel is equally at sea in respect of the other points of alleged difference, the presence of which, it is declared, would mark an institution that "would not be tolerated, even in the absence of an anti-trust act."

12. The counter "series of inquiries" indicate a conception on the part of counsel concerning commercial matters which not even Mr. Bellamy would apply in his exploited chimerical Utopia of centuries hence. Exchanges and their rules are beyond criticism, even at his iconoclastic hand.

These answers occur (among many others already outlined) to the inquiries so suggested:

a. The privileges of exchanges are incident to membership in good standing only.

b. The idea seems to be that the honorable men engaged in an occupation should, by means of an exchange, build

up and strive to maintain a market, merely to the end that those who owe no allegiance to the body and who announce a purpose conspicuously to violate its rules may succeed in destroying or impairing the good name of the market in question. To the contrary, the royal commission solemnly concluded that *the interests of the public* imperatively require that *all brokers* should be within the jurisdiction of the exchange and its rules. (Brief, p 214*x*.)

c. The reason the packing-houses are represented in the exchange appears in the Record (pp. 165, 179) and has been further elaborated *supra*. If buyers were not included in the membership, there could be no market, and it could never come to pass that the actual value of property which is dealt in at an exchange is best determined by the prices there realized or the reasonable value of services rendered by the schedule fixed by such a body.

People *vs.* Coleman, 107 N. Y., 544.
In re Gould's Estate, 46 N. Y. Supp, 506, 511, 512.
Comm. *vs.* People's Traction Co., 39 Atl. Rep., 42, 44 (Pa.).
Gilman *vs.* Stevens, 54 How. Pr., 197.

d. The success of non-member competitors means the destruction of the exchange and of the market it has built up and a consequent loss to all its members. This of itself justifies rule XVI and makes it absolutely essential.

e. Any obligation of the packers in the premises, as has been repeatedly explained, arises wholly from *a contractual relation into which they have voluntarily entered* and which they are the most desirous of *adhering to*. They have made their choice. The present action seeks to deprive them of the constitutional right to do so. *They are appellants here* praying a reversal of the order appealed from.

f. The result of a want of uniformity in commissions and of irregular practices in other respects is a serious injury to the market, and that injury is necessarily visited most heavily on the reputable and innocent. (See Principal Brief, pp. 214*cc*, 214*dd*.)

g. It is better for the public and for the trade in general that a reasonable uniform commission be charged than that rebates and favoritism should prevail, the loss incident to granting which must inevitably be retrieved by underhand practices.

h. The defendants, being engaged in a mere private occupation, have a lawful right, sanctioned by constitutional guaranties, to fix the wages at which they are willing to serve.

i. That the entrance fee of $2,500 is "the price which the privilege of the monopoly commands" is the grossest of errors. The exchange is not organized for profit. It does not sell the privilege of membership for the sake of profit, nor does it declare dividends. Its income is used solely to defray the expenses of inspection departments and transportation bureaus, and to the promotion and development of the market. The exchange has no monopoly to sell. Each member must compete with every fellow, and all of them with the world at large.

The membership fee is merely a guarantee that the member elected will live up to the rules. Fines cannot be collected by legal process. Submission to suspension or expulsion or a surrender of membership exhausts the power of the exchange. If the guarantee were small, there would be a constant temptation to weigh this amount against the profits to accrue from an improper practice. A member might yield, as he has been known to yield, when the investment in his membership (the value of which measures the maximum penalty which the exchange can inflict and

enforce) was but small in comparison with what might be realized by wrong-doing. Unfortunately, human nature is not always proof against temptation. Rules of such bodies, as are public laws, are designed to *deter* from improper conduct. Experience has demonstrated that $2,500 will ordinarily cover any benefits to be derived from a breach of contract, a failure to remit, or a violation of the rules in other respects. By fixing this amount the probabilities of wrong-doing are reduced to a minimum. Hence, as the market has grown and a necessity for an increase of guarantee has developed, the membership fee has risen in response to the requirements of the occasion.

In practice, however, this exchange receives no income from this source, as memberships are now universally bought from holders desirous to retire from business or the like.

Again, the calling is one of great responsibility. The public is entitled to be assured that the guarantee implied in permitting a person to hold himself out as the member of an exchange is one of substance. The exchange cannot become liable to pay losses, but it can and does compel its members to keep their contracts. "More violations of rules in respect of these matters have been made the occasion of discipline than for all other causes" (Rec., p. 179; Principal Brief, pp. 159–162, 214*w*, 214*x*). Its power in this respect is great or small in proportion to the value of the membership at stake.

j. It is true of all the matters covered by the rules that the provision made is the result of long experience and vigilant attention on the part of those best qualified to judge and most deeply interested in deciding justly. Any attempt to overrule these provisions "would be detrimental to *the honest and efficient conduct of business.* * * * Such a body can hardly be interfered with without destroying that freedom of self-government which is the *only life and soul of business.*" (Principal Brief, p. 214*x*.)

It is not a question of forming an exchange satisfactory to those who desire to reap its advantages without assuming the obligations of membership, and to reap where they have not sown, or who are bent upon tearing down and destroying what others are striving to develop and maintain. Complimentary as the allusion to the "consummate ability" of the appellants' counsel may be, it is far beyond human power to work miracles or to accomplish impossibilities.

13. It will be noted that the answer (which has at least the force and effect of an affidavit under the 41st equity rule, as amended, and which it was in nowise undertaken to contradict) distinctly and specifically pleads that all other commercial exchanges possessed the same characteristics and rules which are here attacked as proof conclusive of criminality (Rec., pp. 163, 164). If all that is disclosed by a detailed review of these rules, taken from standard text books, governmental reports, and authorized current publications (and therefore the subject of judicial notice, as shown in the Principal Brief, p. 93), be discarded, the fact of complete identity on the part of all typical exchanges (and all that it proved or implied as a result) stands disclosed by the record and is nevertheless undisputed, uncontradicted, and beyond cavil.

14. That exchanges have accomplished their mission is conceded, for counsel say "that the formation of exchanges may be admitted to have *benefited trade and commerce.*" If this consummation is lawful, how can the means by which it was reached be adjudged to be criminal? A still stronger admission is disclosed by the fact that the citation of cases in support of the oft-repeated assertion that exchanges cannot override the law is limited to two classes:

a. Those condemnatory of *wagering contracts:* but as every reputable exchange sternly prohibits these, the litigation on the *subject marks a violation of exchange rules,* not a

void provision, and generally discloses that exchanges will not lend their aid to enforce such dealings.

b. Those holding that in matters of contract a rule of an exchange does not bind *an absolute stranger thereto.*

These propositions are wholly foreign to any issue in the present case. The phases of exchanges which are here involved fall within the commendatory paragraphs of the quotations from Professor Jevons and Mr. Wheatley. So far as the pending questions are concerned, these authors but supplement what every thoughful writer has said on the same subject.

15. If the welfare of trade had not called for an adequate code of regulations for its orderly and honorable conduct, exchanges would not have come into being, nor multiplied throughout the civilized world, nor stand authorized and sanctioned by legislation, by the courts, and all departments of government. It is not believed that any positive, unbending legislative enactment exists the terms of which so unmistakably indicate a legislative intent that these beneficent bodies are to be destroyed, and that this court is powerless to avert the disaster to our commercial welfare and development, which is sought to be inflicted by means of this proceeding. We entreat a dispassionate perusal of the order appealed from in proof of our claim that its commands are destructive of the most cherished rights of American citizens, and in the teeth of constitutional guaranties hitherto regarded as of the most sacred character—propositions which are fully covered by the assignment of errors. (Rec., pp. 280–283.)

Respectfully submitted.

L. C. KRAUTHOFF,
Of Counsel for Appellants.

KANSAS CITY, MO., *February* 15, 1898.